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No. 92-973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,
Petitioners,

v.

TRANSAMERICA LEASING INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

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RESPONDENT'S SUPPLEMENTAL MEMORANDUM

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TABLE OF AUTHORITIES

CASES: Page

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 2

Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983) 4

Itel Containers International Corp. v. Huddleston, Sup. Ct. No. 91-321 (February 23, 1993) .....*passim*

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) .....*passim*

Wardair Canada Inc. v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 3

UNITED STATES CONSTITUTION:

Foreign Commerce Clause, art. I, § 8, cl. 3 1

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This case, like *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), involves imposition of a state ad valorem property tax on shipping containers used exclusively in foreign commerce. The courts below, carefully applying the test set forth in *Japan Line*, held that petitioners' tax on respondent Transamerica's shipping containers is invalid under the foreign commerce clause, art. I, § 8, cl. 3 of the United States Constitution, because it creates a substantial risk of international multiple taxation. Pet. App. 8a.

Petitioners argue that the courts below erred in following *Japan Line* because the shipping containers here are owned by a domestic rather than, as there, a foreign corporation. But this Court's intervening decision in *Itel Containers International Corp. v. Huddleston*, No. 91-321 (February 23, 1993), involving the validity of a sales tax on rentals received by a domestic lessor of shipping con-

tainers, belies petitioners' contention that the nationality of the taxpayer alters the nature of the inquiry under the foreign commerce clause. The courts below did not err in adhering to the *Japan Line* test.

1. In *Itel Containers*, this Court began its analysis of the question presented under the foreign commerce clause by explicitly reaffirming what it had said in *Japan Line*: a state tax on instrumentalities of foreign commerce not only must satisfy the requirements of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), but also (i) must avoid creating a substantial risk of international multiple taxation and (ii) should not interfere with the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. *Itel Containers*, slip op. 10-11, citing *Japan Line*, 441 U.S. at 451. The Court thus confirmed the applicability of the *Japan Line* test to cases, such as this, involving taxes on domestically owned instrumentalities of foreign commerce. The lower courts in this case, in other words, applied the correct constitutional test.

2. The Court then addressed the *Complete Auto* test, which looks to whether the challenged state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 12, quoting *Complete Auto*, 430 U.S. at 279. The taxpayer in *Itel Containers* conceded that the Tennessee tax there at issue met that test. *Id.* That "confirm[ed] both the State's legitimate interest in taxing the transaction and the absence of an attempt to interfere with the free flow of commerce, be it foreign or domestic." *Id.* at 13.

This case is completely different. The trial court expressly held that petitioners' ad valorem property tax does not meet the *Complete Auto* test, *see* Pet. App. 19a, and the court of appeals did not disturb that holding. *See id.* at 8a. The state courts themselves thus have rejected pe-

titioners' claim to have a legitimate local interest in taxing Transamerica's shipping containers. This consideration alone undercuts petitioners' suggestion that this case is "similar" to *Itel Containers*. *See* Pet. 11.

3. The Court in *Itel Containers* then proceeded to determine whether the sales tax there at issue "create[s] the substantial risk of international multiple taxation that implicates foreign commerce clause concerns." *Itel Containers*, slip op. 14. In concluding that the tax did not pose such a risk, the Court relied upon two considerations, neither of which is present in this case.

First, the Court reasoned that because the payment of lease rentals is "a discrete transaction occurring within the State," *id.* at 13, a sales tax on such rentals poses little practical risk of multiple taxation. *See also Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 9 (1986) ("there is no threat of multiple international taxation in this case, since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only"). The situation is very different with respect to ad valorem property taxes like those at issue here and in *Japan Line*. Such taxes are levied in full on migratory instrumentalities of foreign commerce that have only a temporary and fleeting connection with the taxing jurisdiction. This poses a manifest risk of multiple international taxation as the subject containers move around the world.

Second, the Court noted that "Tennessee credits against its own tax any tax properly paid in another jurisdiction, foreign or domestic, on the same transaction," a measure that "reduces, if not eliminates, the risk of multiple international taxation." *Itel Containers*, slip op. 14. In contrast, neither petitioners nor the State of Texas provide any similar credit or other like protection against that risk. *See* Pet. 5; Pet. App. 8a, 36a.

4. In the end, the Court in *Itel Containers* left the relevant foreign commerce clause analysis unchanged. Al-

though a state may, within certain limits, tax a transaction that is also potentially subject to taxation by a foreign sovereign, *see Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983), it may not "create[] a substantial risk of international multiple taxation." *Japan Line*, 441 U.S. at 451. As petitioners concede, the constitutional analysis at bottom calls for a judgment concerning, essentially as a factual matter, which side of the line a case falls on. *See* Pet. 8. The courts below properly exercised their judgment on this issue, and nothing in *Itel Containers* calls that judgment into question.

In conclusion, this Court's intervening decision in *Itel Containers* affords no basis for disturbing the ruling below. For the reasons stated here and in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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